

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34481

HORSEHEAD CORPORATION–PETITION FOR ACQUISITION AND OPERATION
EXEMPTION–CHESTNUT RIDGE RAILWAY COMPANY

Decided: March 12, 2004

By petition filed March 8, 2004, Horsehead Corporation (Horsehead) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 to acquire and operate a 6.6-mile line of railroad in Carbon County, PA, that was formerly operated by the Chestnut Ridge Railway Company (Chestnut). Horsehead also requests that the exemption be made retroactive back to the date it actually acquired the line. The exemption will be granted with retroactive effect.

BACKGROUND

Among the assets controlled by Horsehead Industries, Inc. (HHI) was a 6.6-mile rail line owned by one of HHI's subsidiaries, Chestnut. In addition to serving a zinc recycling/production facility at Palmerton, PA, also owned by HHI, the line has served three other shippers from time to time, Ampal, LaRouche Industries, and Prince Manufacturing Company. The 6.6-mile rail line connects with Norfolk Southern Railroad Company at Palmerton, PA.

HHI entered bankruptcy reorganization in 2002 and almost all of its assets, including the rail line owned by Chestnut, were auctioned in December 2003. Horsehead purchased the rail line on December 23, 2003, but inadvertently failed to either seek authority or file for an exemption to acquire and operate the line. On March 8, 2004, Horsehead filed the instant petition seeking the appropriate authority. On the same date, Chestnut Ridge Railway Corporation (CHR), a subsidiary of Horsehead, filed a Notice of Exemption in STB Finance Docket No. 34480 to acquire and operate the rail line formerly owned by Chestnut. Horsehead and CHR plan to sign the agreement consummating the sale of the line when the Notice of Exemption becomes effective, which is March 15, 2004.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10901, a person other than a rail carrier may acquire and operate a rail line only if the Board issues a certificate authorizing such activity. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation upon finding that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the

transaction or service is of limited scope; or (b) regulation is not needed to protect shippers from the abuse of market power.

An exemption from the prior approval requirements of 49 U.S.C. 10901 is consistent with the standards of 49 U.S.C. 10502. Detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy. An exemption from the application process will minimize the need for Federal regulatory control [49 U.S.C. 10101(2)], foster sound economic conditions in transportation [49 U.S.C. 10101(5)], reduce regulatory barriers to entry into and exit from the rail industry [49 U.S.C. 10101(7)], and encourage efficient management of railroads [49 U.S.C. 10101(9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of this transaction is not needed to protect shippers from the abuse of market power. There has been no loss of rail competition and no adverse change in the competitive balance in the transportation market. Nor has there been a change in the level of service to any shippers because they continued to receive the same service from Horsehead. Given the market power finding, the Board need not determine whether the proposed transaction is limited in scope.

Because Horsehead became a Class III carrier when it acquired the rail line, this transaction is governed by 49 U.S.C. 10901 and the imposition of labor protective conditions is precluded. Under 49 CFR 1105.6(c)(2), no environmental documentation is necessary for the subject acquisition, which does not involve construction or significant changes in rail operations. Under 49 CFR 1105.8(b)(1), no historic report is required because the subject transaction is for continued rail serve and any abandonment thereof would be subject to Board jurisdiction.

Horsehead asserts that its failure to seek approval or an exemption when it purchased the line in December was inadvertent and due to the rushed nature of the bankruptcy proceedings. Consequently, Horsehead requests that its exemption be granted retroactively. While retroactive exemptions are generally to be avoided, the agency has granted them on occasion when the failure to seek approval was unintentional.¹ Under the circumstances, the Board will grant the exemption retroactively. And, because of the unusual circumstances surrounding the ownership of the 6.6-mile line and the pending transaction in STB Finance Docket No. 34480, the exemption will be effective March 12, 2004, rather than the normal 30 days after service of the decision and publication in the Federal Register.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

¹ See Brotherhood of Maintenance of Way Employees, et al. v. Soo Line Railroad, et al., STB Finance Docket No. 32964, et al. (STB served Dec. 22, 1998).

It is ordered:

1. Under 49 U.S.C. 10502, the above-described transaction is exempted from the prior approval requirements of 49 U.S.C. 10901 and the exemption is made retroactive to December 23, 2003.
2. Notice will be published in the Federal Register.
3. The exemption will become effective on March 12, 2004.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary